No. 75-391

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In the Supreme Court of the United States

OCTOBER TERM, 1975

KATHLEEN MAUDE MUCKENSTRUM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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Petitioners contend that their convictions should be reversed because the prosecution failed to reveal that one of its witnessess had received subsistence payments and because the trial court instructed the jury erroneously on the prosecution's burden of proof in criminal cases.

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were each convicted of conspiracy to engage in unlawful interstate prostitution activities, in violation of 18 U.S.C. 371, and of using interstate facilities to promote prostitution, in violation of 18 U.S.C. 1952. In addition, petitioner Reed was convicted of inducing a woman to engage in interstate prostitution, in violation of 18 U.S.C. 2422.

Petitioner Reed was sentenced to concurrent terms of three years' imprisonment on each of his convictions and fined $4,500. Petitioners Hertzka and Hodges were sentenced to concurrent terms of two years' imprisonment on each of their convictions.[1] Petitioner Muckenstrum received concurrent sentences of two years' probation on each of her convictions.

The evidence showed that petitioner James Reed managed a prostitution ring based in Miami, Florida. During these activities, he had several women travel to Florence, South Carolina, to work as prostitutes at a brothel operated by petitioner Jean Hertzka, also known as Pat Walker. Specifically, Nevada Jean Robertson testified that Reed enticed her to Miami from Dyersburg, Tennessee, in late August or early September, 1972, with promises of steady and lucrative employment (Tr. 34-35). Shortly after her arrival in Miami, Reed announced to Robertson that she would be traveling to Florence to begin her new job (Tr. 43). Reed then provided Robertson's plane fare to South Carolina (Tr. 44).

Robertson was met at the Florence airport by petitioner Muckenstrum, who took Robertson to Hertzka's house of prostitution (Tr. 45-47). Robertson then engaged in prostitution in Florence, South Carolina, together with petitioners Muckenstrum and Hodges, for approximately one week, after which she and Hodges returned to Miami with the earnings they had received from Hertzka (Tr. 50). That money was subsequently turned over to Reed (Tr. 51).

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[1]Petitioner Hodges received "split-sentence" treatment pursuant to 18 U.S.C. 3651 such that all but thirty days of her jail sentence was suspended. Hodges was placed on probation for two years.

Melanie Gordon testified that she had worked as a prostitute for Reed during 1971, and that, at Reed's suggestion, she traveled with petitioners Muckenstrum and Hodges to Hertzka's apartment in Florence, South Carolina, in late August 1972, for the purpose of working "the races" (Tr. 125-126). While there, she worked for an "escort service" run by Hertzka and, in that capacity, engaged in prostitution over a two-week period (Tr. 128). She reported having become acquainted with Nevada Jean Robertson during her stay in Florence (Tr. 148).

She and Muckenstrum returned to Miami, where they turned over a substantial sum of money to James Reed (Tr. 129-131). In October 1972, Gordon used Reed's apartment telephone to question Hertzka about a possible return trip to South Carolina (Tr. 131). After securing permission and financing for the trip from Reed, Gordon returned to Florence in mid-October (Tr. 132-133).

Earline Edwards, who worked in Hertzka's house of prostitution in Florence, also testified for the government as to the prostitution activities carried on there, including her custody of the income from the house, which she would turn over to Hertzka at the end of the day (Tr. 102-121).

In addition, the government introduced testimony of Reed's housekeeper (Tr. 164-176) and telephone company records to show that Reed had kept two of the defendants in his house in Miami and that his household had been in frequent contact with the Hertzka prostitution operation in Florence during the relevant time period (Tr. 187-191; Gov. Exh. 2).

1. Petitioners contend that the government's failure to disclose its subsistence payments to witness Nevada Jean Robertson[2] made prior to trial violated the principles of

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[2]Robertson received approximately $1,000 in government subsistence payments, as authorized by Pub. L. 91-452, Title V, Sections 501-504, Organizaed Crime Control Act of 1970, 84 Stat. 933. The money was used for transportation and living expenses incurred during her protective custody in Denver, Colorado.

Giglio v. *United States*, 405 U.S. 150, and *Napue* v. *Illinois*, 360 U.S. 264. While such payments may bear on the credibility of recipient witnesses, see *United States* v. *Librach*, C.A. 8, No. 75-1153, decided July 30, 1975, the facts here show that no reversible error occurred.

Defense counsel were in no way misled regarding the government's treatment of Robertson. Indeed, defense counsel were informed by the prosecution at a benchside conference during their cross-examination of Robertson that the witness was under protective custody (Tr. 96-97); yet, they chose not to inquire further of the prosecution or of Robertson regarding that custody or the possibility of witness subsidies which routinely complement the government's protective custody program.

Additionally, the non-disclosure alleged here could not "in any reasonable likelihood have affected the judgment of the jury." *Giglio*, *supra*, 405 U.S. at 154. Defense counsel on their cross-examination of Robertson brought out prior inconsistent statements (Tr. 73-74, 86-87) and damaging information regarding her activities subsequent to her activities in South Carolina (Tr. 84, 101). The additional impeaching evidence at issue would have been merely cumulative and would not have destroyed Robertson's credibility.

Finally, as the court of appeals held (Pet. App. A-2 to A-3), even assuming that the disclosure of the subsistence payments would have caused the jury to discredit Robertson's testimony entirely, this would not have led to a different verdict in light of the other overwhelming evidence against petitioners.[3]

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[3]Compare *Giglio* v. *United States*, *supra*, 405 U.S. at 154-155.

2. Petitioners also challenge the following jury instruction (Tr. 309-310):

> A defendant in a criminal case is presumed by law to be innocent, and that presumption remains with him throughout the trial, unless and until he is proven guilty of the crimes charged by credible evidence beyond a resonable doubt.
>
> The burden of proving a defendant guilty beyond a reasonable doubt rests upon the Government. This burden never shifts throughout the trial.
>
> The law does not require a defendant to prove his innocence or to produce any evidence. He may rely upon evidence brought out on examination of witnesses for the Government.
>
> If the Government fails to prove a defendant guilty beyond a reasonable doubt, the jury must acquit him or her.
>
> Now, a reasonable doubt, as used in these instructions, means a doubt that is based on reason and common sense. Such doubt must be substantial rather than speculative, that is, a defendant is never to be convicted on mere suspicion or conjecture. Such doubt, however, must be a doubt that is reasonable and one which arises from the evidence or lack of it.
>
> It does not mean a mere possible doubt or a speculative, imaginary or forced doubt, because anything relating to human affairs is open to some possible or imaginary doubt.

Petitioners' counsel, Mr. London, objected to the charge's paragraph defining reasonable doubt at a bench conference (Tr. 256). The court then asked "Do you want me to substitute the word 'real' [f]or 'substantial'?" (Tr. 257). Mr. London said that he thought any definition of

reasonable doubt lessened the burden on the government and confused the jury (*ibid.*). The court stated that it had a duty "to define the words it uses" (*ibid.*) and in the absence of definition offered by petitioners gave the instruction as written.

It is, of course, not error for the court to define reasonable doubt, and the trial judge must be given some latitude in his choice as to the best way to do so. See *Holland* v. *United States*, 348 U.S. 121, 139-140. Petitioners argue that the instruction here is erroneous because it equated "reasonable doubt" with "substantial doubt," thereby lowering the government's burden of proof. However, petitioners did not offer a substitute definition, and when considered in the context of the total charge, *United States* v. *Park*, 421 U.S. 658, the instruction "correctly conveyed the concept of reasonable doubt to the jury." *Holland* v. *United States*, *supra*, 348 U.S. at 140. The context makes clear that the trial court used the word "substantial" to mean "real" or "non-speculative" rather than "of great magnitude" as petitioners' argument implies. The court of appeals therefore, while criticizing the use of the word "substantial," properly found no reversible error (Pet. App. A-4).

Petitioners also argue that, by instructing the jury that a defendant might "rely upon evidence brought out on examination of witnesses for the Government," the trial court implied that a defendant must produce some evidence of innocence in order to avoid conviction, thereby impermissibly shifting the burden of proof. However, the trial court emphazied throughout its instruction (p. 5, *supra*) that the burden of proof "rests upon the Government," that it "never shifts throughout the trial," and that "[t]he law does not require a defendant to prove his innocence or to produce any evidence." Thus, "the charge as a whole

[made] it clear that the burden of proof of guilt * * * was placed squarely upon the State." *Leland* v. *Oregon*, 343 U.S. 790, 795.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.